SUBJECT INDEX

PAGE

Order in Controversy 2

Historical Statement 5

Proceedings in Fifteen Per Cent Case, 1931 5

Proceedings before the Louisiana Public Service Commission following the Fifteen Per Cent Case, 1931 14

Proceedings before the Interstate Commerce Commission, in No. 25,135, Increases in Intrastate Freight Rates, Part 5—Louisiana 18

Commodities Exempted from Surcharges by Interstate Commerce Commission and by Louisiana Commission 15

Summary of Argument 21

ARGUMENT:

(1) The Interstate Commerce Commission is without power to prescribe intrastate rates within the State of Louisiana where no finding is made that interstate rates to whose level the intrastate rates are raised, are just and reasonable 25

(2) Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section must be done in the exercise of its powers to prescribe just and reasonable rates under those sections of the Act authorizing it to prescribe such rates 30

(3) The Commission is a statutory body existing only by the will of Congress and exercising only

SUBJECT INDEX—Continued

PAGE

such powers as have been expressly delegated to it. It cannot go beyond these powers, and is held to a strict compliance with the statute in matters of jurisdiction and procedure 37

(4) The order is invalid because it is not supported by the essential findings required to support an order interfering with intrastate rates 42

(5) The dissenting opinion of Four Commissioners in the light of subsequent events show that there was no substantial discrimination against interstate commerce to be removed 44

(6) There was no evidence before the Commission dealing with the period covered by intrastate surcharges, and no findings were made as to the result of the application of the surcharges during that period 49

(7) The Commission has many times held that it has no power to disturb intrastate rates until it has determined the reasonableness of the interstate rates 54

(8) Mere general permission of the Commission to all carriers to apply certain specified surcharges on some traffic and denying them the authority to apply surcharges on other commodities, is not the prescribing of just and reasonable rates in the manner required by Sections 1 and 13 (4), in removing discrimination against interstate commerce caused by a disparity in intrastate and interstate rates 57

(9) The arbitrary nature of the Commission's order 61

(10) Subsequent reports of the Commission in Fif-

SUBJECT INDEX—Continued

PAGE

teen Per Cent Case, 1931, show that the expected revenues from the surcharges did not materialize, and that there was no foundation for a prediction as to increased revenues as a result of the intrastate surcharges, which finding it had refused to make 64

Cases relied upon by the appellants 69

Conclusion 71

Appendix "A", Order of the Commission of July 25, 1933, vacating, setting aside, and discontinuing proceedings instituted by carriers for an extension of Louisiana, etc., intrastate surcharges from March 31, 1933, to September 30, 1933 72

Appendix "B", Interstate Commerce Act (24 Stat. 379), as amended by Transportation Act, 1920, (41 Stat. 546),

Section 13 (3) 74

Section 13 (4) 75

Section 15a (2) 75

Section 15a (3) 76

LIST OF CASES

PAGE

Atchison, Topeka & Santa Fe Ry. Co. v. Arizona Grocery Co., 49 Fed. (2d) 563, (affirmed, Arizona Grocery Co. Atchison T. & S. R. Co.) (post) ____ 59

Alabama v. United States, 283 U. S. 776, 75 L. Ed. 1406 70

Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U. S. 370, 387, 76 L. Ed. 348, 354 ____ 37, 60

Atchison, Topeka & Santa Fe R. Co. v. United States, et al., 284 U. S. 247, 248, 76 L. Ed. 273 ____ 41

Atlas Portland Cement Co. v. Chicago, B. & Q. R. Co., 81 I.C.C. 1 ____ 55

Brimstone R. & Canal Co. v. United States, 276 U. S. 104, 72 L. Ed. 487 ____ 40

Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598 ____ 30

Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 68 L. Ed. 388 ____ 71

Dissenting Opinions:

Commissioner Lewis, in I.C.C. No. 25,135, Increases in Intrastate Freight Rates and Charges, 186 I.C.C. 665 ____ 44

Commissioner Aitchison, in I.C.C. No. 25,135, etc., 186 I.C.C. 666 ____ 45

Commissioner Brainard, in I.C.C. No. 25,135, etc., 186 I.C.C. 667 ____ 47

Commissioner Tate, in I.C.C. 25,135 etc., 186 I.C.C. 668 ____ 47

Dissenting opinions, Third Supplemental Report in Fifteen Per Cent Case, 1931, supra,
Commissioner Eastman, McManamy joining, 191 I.C.C. 372-374 ____ 64

Commissioner Porter, 191 I.C.C. 375-377 ____ 66, 67

LIST OF CASES—Continued

PAGE

Commissioner Tate, 191 I.C.C. 380, 381 ..... 68, 69

Eagle Cotton Oil Co. v. Southern Ry. Co., et al., 51 Fed. (2d) 443 58

Ex Parte 74, Increased Rates, 1920, 58 I.C.C. 220 34

Fifteen Per Cent Case, 1931, 178 I.C.C. 539, 179 I.C.C. 215, 191 I.C.C. 361 ..... 3, 5, 6, 7, 8, 9, 12, 13, 14, 19, 21, 23, 24, 35, 50, 62, 63

Third Supplemental Report, 191 I.C.C. 361 ..... 10, 11, 12, 52, 54, 64

Florida v. United States, 282 U. S. 194, 75 L. Ed. 291 ..... 29, 42, 43, 44, 53, 62

Georgia Public Service Commission v. United States, 283 U. S. 767, 75 L. Ed. 1397 39

Georgia Public Service Commission v. United States, 39 Fed. (2d) 167, 169, 170 ..... 38, 70

Hunter Brothers Mercantile Co. v. American Ry. Exp. Co., 107 I.C.C. 313 55

Illinois Central R. Co. v. Public Util. Com., 245 U. S. 493, 62 L. Ed. 425 32

Interstate Commerce Act:

Section 13 (3) and (4), U. S. Code, Title 49, Sec. 13, 41 Stat. at L. 484 ..... 19, 33, 57

Section 15 (1), U. S. Code, Title 49, Sec. 15 (3) 26

Section 15 (7) 57, 63

Section 15a (2) 33, 57

I.C.C. No. 25,135, Increases in Intrastate Freight Rates and Charges, Part 5—Louisiana, 186 I.C.C. 615 ..... 19, 20, 21, 24, 25, 50

Louisiana Public Service Comm. v. T. & N. O. R. R. Co., et al., 284 U. S. 125, 76 L. Ed. 201 70

LIST OF CASES—Continued

PAGE

Louisville & Nashville R. R. Co. v. United States, 282 U. S. 740, 75 L. Ed. 672 56

New England Divisions Case, 261 U. S. 184, 67 L. Ed. 605 70

Ohio State Rates on sand, gravel, stone and paving blocks, 85 I.C.C. 66 54

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 357 U. S. 563, 66 L. Ed. 371 ..... 33, 52, 69

Rates on sulphuric acid from Natrona, 148 I.C.C. 403 56

Shreveport Case, Houston, East and West Texas R. R. Co. v. United States, 234 U. S. 342, 58 L. Ed. 41 ..... 30, 31

Slatting cars for watermelons, 78 I.C.C. 732 54

State of New York v. United States, et al., 257 U. S. 571, 66 L. Ed. 385 34

Urgent Deficiencies Act, October 22, 1913, Ch. 32, 38 Stat. at L. 203, 219, 220, U. S. Code, Title 28, Sec. 17, Jud. Code, Sec. 283 4

Virginia Corp. Comm. v. Aberdeen & R. Co., 136 I.C.C. 173 55

Wisconsin Passenger Fares, 59 I.C.C. 391 33

No. 17

Supreme Court of the United States

OCTOBER TERM, 1933

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, TEXAS & NEW ORLEANS RAILROAD COMPANY, ET AL.,

Appellants,

versus

THE STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION, AND THE LOUISIANA HIGHWAY COMMISSION.

Appeal from the District Court of the United States for the Eastern District of Louisiana, Honorable Rufus E. Foster, Circuit Judge, and Honorables Wayne G. Borah and Allen Cox, District Judges, Sitting as a Special Court.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION, AND THE LOUISIANA HIGHWAY COMMISSION, APPELLEES.

(Report of the Commisison, 186 I.C.C. 615, R. 35-38.)

(Opinion below. *State of Louisiana, et al. v. United States*, 2 F. Supp. 545. R. 273.)

May It Please the Court:

This suit was brought by the State of Louisiana, the Louisiana Public Service Commission, and the Louisiana Highway Commission, to enjoin, set aside and annul the order of the Interstate Commerce Commission issued November 7, 1932, in the proceeding before the Commission

numbered and entitled *"No. 25,135, Increases in Intrastate Freight Rates and Charges, Part 5, Louisiana."* The orders in controversy are as follows:

"ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1932

No. 25135

Increases in intrastate freight rates and charges, Part 5—Louisiana

It appearing, That by order dated April 4, 1932, the commission upon petition of various carriers entered upon an investigation under Docket No. 25135, to which investigation all railroads subject to the jurisdiction of the commission within the several States designated in said order were made respondents, and that the investigation was divided into several separate parts, one for each State whose rates and charges were brought into question, and that the commission on September 29, 1932, made and filed its report in the above-entitled proceeding, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and cause appearing therefore:

It is ordered, That the respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the unjust discrimination against interstate commerce found in said report to exist, and to establish, put in force, and maintain for the transportation of said, gravel, shells, crushed stone, and similar road-building materials; salt cake; fertilizer and fertilizer materials; cottonseed cake, meal, bran, hulls, and meats; pulpwood; stave bolts; refined sugar; sweet-potatoes; fresh vegetables; pulverized limestone; waste

wood; second-hand sugar bags; waste paper; soya beans, velvet beans, Austrian winter peas, and cow peas; rosin sizing; potash nitrate; sirup and molasses; blackstrap molasses; crude fire clay; clay, n.o.i.b.n.; charcoal; bolts; and all less-than-carload traffic in intrastate commerce within the State of Louisiana, **rates which shall be not lower than the rates now in force and applicable to the intrastate transportation of said traffic within the State of Louisiana, plus the surcharges authorized by the findings in *Fifteen Percent* case 1931, 178 I.C.C. 539, and 179 I.C.C. 215, on corresponding interstate traffic so long as such surcharges are maintained on such traffic in accordance with said findings.**

It is further ordered, That this order shall become effective on December 16, 1932; that respondents shall comply therewith upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act; and that **it shall remain in force until the further order of the Commission.** (Our emphasis.)

GEORGE B. McGINTY,
Secretary.

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1932

No. 25135

Increases in intrastate freight rates and charges, Part 5—Louisiana

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition on behalf of the New Orleans Joint Traffic Bureau to amend and modify the findings herein so as to exempt raw sugar and bagasse, or, if such exemption cannot be made upon the present record, to reopen the proceeding for further hearing with respect to these commodities:

It is ordered, That the above-entitled proceed-

ing be, and it is hereby, reopened for further hearing with respect to raw sugar and bagasse at such time and place as the Commission may hereafter direct.

By the Commission.

GEORGE B. McGINTY,
Secretary."

(Seal)

(R. 2, 3.)

The report of the Commission is printed on pages 11-62, and that part dealing with Louisiana, Part 5, is printed on pages 35-38, of the record.

The suit was brought under the *Urgent Deficiencies Act*, October 22, 1913, ch. 32, 38 Stat. at L. 203, 219, 220, U. S. Code title 28, Sec. 47, and Jud. Code, Sec. 283, as amended February 13, 1925 (c. 229, 43 Stat. 936, 938 (U. S. C. title 28, Sec. 345), in the United States District Court for the Eastern District of Louisiana, and was heard by a special three-judge court composed of Circuit Judge Foster, and District Judges Borah and Cox, on an application for an interlocutory injunction which was granted. (R. 273, 277.)

The case was submitted on final hearing before the same court under a stipulation among counsel for the plaintiffs, defendants, and interveners, that the case be disposed of upon the pleadings, exhibits, evidence, briefs and arguments of counsel, presented at the preliminary hearing. (R. 277.)

The final decree was entered on December 22, 1932, denying the prayers of the United States and of the Interstate Commerce Commission, and the intervening railroads, to dismiss the petition, and making the preliminary injunction perpetual. (R. 278.)

The appeal was brought direct to the Supreme Court.

(U. S. Code, title 28, sec. 47, p. 869, Act of October 22, 1913, c. 32, 38 Stat. 220.)

No stay of the decree pending the appeal was sought or granted.

HISTORICAL STATEMENT.

Proceedings in Fifteen Per Cent Case, 1931.

On June 17, 1931, the railroads of the United States filed with the Interstate Commerce Commission their petition for authority to make a general increase of fifteen per cent in all interstate freight rates. The proceeding before the Commission was designated as *"Ex Parte 103, Fifteen Per Cent Case, 1931."* (178 I.C.C. 539, 179 I.C.C. 215, 191 I.C.C. 361.)

The application was filed under Section 6 of the Interstate Commerce Act, and requested authority to depart from the ordinary rules of the Commission governing tariff publication, coupled with the request that the Commission reach the conclusion, after investigation, that if the contemplated tariffs were filed, they would not be suspended. (R. 81.)

In due course, after hearing, the Commission rendered an opinion dated October 16, 1931, in which the increases applied for were denied upon two grounds, namely, (1), **"that such increase in all freight rates and charges would increase revenue, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm rather than to help the railroads,"** and (2), **"that such an increase would raise the rates upon many kinds of traffic above a just and reasonable level."** (R. 97.)

Having denied such increase, the Commission **"for the purpose of increasing confidence and averting developments which might further disturb an already tremend-**

ously shaken financial situation, and to avoid impairment of an adequate system of transportation," stated:

> "It does not follow, however, from the conclusions above set forth that no increase in rates should be made at this time. As a result of investigations extending over many months we have prescribed, effective December 3, 1931, maximum reasonable rates on class traffic in official and western trunk-line territories and between those territories whose net effect we believe will be a substantial increase in revenue, unless diversions to trucks attain unanticipated proportions. We have also prescribed maximum reasonable rates throughout the country on furniture, effective February 25, 1932, which may produce increased revenue, although the danger of diversion to trucks is greater in the case of furniture than in the case of class traffic taken as a whole. We have also prescribed maximum reasonable rates on livestock in the western district, effective January 25, 1932, which should increase the revenue from this traffic in western trunk-line territory, where the revenues of the railroads have been particularly low. A similar revision, in general upward and effective December 3, 1931, has been prescribed in the case of petroleum and petroleum products.
>
> In addition to these pending revisions and others which are in progress on our docket, we believe that the traffic departments of the railroads should address themselves to the task of making such changes in the rates on particular kinds of traffic as will, in their judgment after careful analysis of all attendant circumstances, produce additional revenue and which can be supported as reasonable under existing conditions. This does not necessarily mean increases in rates. It is quite likely that there are now many rates which will produce more revenue if they are reduced, and we

include in this category rates which we ourselves have prescribed as maxima. Some such rates have already been reduced, but we fear that there is at times a reluctance on the part of traffic officers, because of possible contingent effects, to cut below these rates even when they believe that the result would be to railroad advantage. But in addition to reductions it is not at all unlikely that there are a considerable number of rates which can reasonably be advanced substantially, even under present conditions.

If tariffs are filed, in accordance with this suggestion, *proposing changes in rates upon particular* movements or kinds of traffic, we shall be guided, in determining whether they shall be suspended not only by the statements filed in support and protest, but also, in part, by our own general knowledge and the record in this proceeding as bearing on the particular kind of traffic in question. It should be noted that the protests which we are here considering do not go to every form of traffic. And to the extent that suspension proceedings are initiated, we shall expedite their disposition." (R. 97, 98.)

The Commission then selected a list of commodities, principally the products of agriculture, upon which no increases were allowed, and permitted the carriers at their option to apply on all other commodities increases ranging from $3.00 per car to 2¢ per hundred pounds. (R. 106-108.)

The Commission attached to its permission to add these surcharges to existing rates, two conditions, later modified, as follows, namely:

(a) That the carriers prepare and submit to the Commission for its approval, a plan for pooling the revenues resulting from such increases, and the distribution thereof, "in the first instance among the carriers who failed to earn

their interest charges, in proportion to their deficiencies," and,

(b). That "the increases herein proposed should be accepted as an entirety.* If, for competitive or other reasons, the carriers decrease any of the rates so increased, the amount of the decrease should be taken from the basic rates rather than from the ear-marked increases provided herein." (R. 100.)

The interested carriers thereafter filed with the Commission a supplemental petition for further consideration, and for certain changes in the previous opinion and finding of the Commission, and, after hearing argument on such petition but without the taking of further evidence, the Commission under date of December 5, 1931, issued its "Supplemental Report on Reconsideration." (179 I.C.C. 215, R. 109.)

The original report was modified "to the extent of relieving the carriers from the necessity of complying with the pooling plan therein described." (R. 113.) The Commission further amended its original report **"to the extent of relieving the carriers from the restriction contained in language hereinbefore quoted, which is as follows:**

> "* * * The increases herein proposed should be accepted as an entirety. If, for competitive or other reasons, the carriers decrease any of the rates so increased, the amount of the decrease should be taken from the basic rates rather than from the ear-marked increases provided herein. * * *" (R. 114.)

These modifications in the supplemental report resulted in two far-reaching changes in the original order, the second of which is most important in the present case

* Later changed so as to make application of surcharges optional.

for the reason that the carriers were under no obligation to apply the surcharges on interstate traffic as a whole, but were left free to elect in what cases and to what extent the interstate surcharges should be applied.

No order was issued by the Commission in either the original or the supplemental proceeding requiring the carriers to apply any of the increases allowed, but they were left free to apply only such increases as they desired to make and to reduce interstate rates where they were increased whenever they considered such action necessary or desirable in order to hold the traffic to their respective lines or increase their revenues. (When the Commission dealt with intrastate rates quite a different rule was applied, as we later show.)

There was no finding by the Commission that any of the interstate rates on the specific commodities, on which the surcharges were authorized, were just and reasonable; and the Commission did not prescribe the rate or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged.

In its original report in *Fifteen Per Cent Case, 1931, supra*, the Commission made no finding that the specific interstate rates, when and if increased by adding the surcharges, were just and reasonable. In its supplemental report no such finding was made; but the Commission says:

> "The freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates." (179 I.C.C. 216, R. 110.)

However, this general statement was without definite meaning or positive effect, because the carriers were relieved by any restriction against reducing or increasing existing rates, and they were under no compulsion to apply the interstate surcharges to existing rates or such rates as they might thereafter establish. The option thus given the carriers as to whether they would apply the interstate surcharges left the whole matter of interstate rates in confusion and doubt. No one could tell then, and no one can tell now, what ultimate rates were applicable on interstate traffic as a result of the general option given the carriers by the Commission to add or not to add the surcharges, or to reduce the interstate rates during the surcharge period. This period was to have expired on March 31, 1933, but was extended until September 30, 1933. (191 I.C.C. 361.)

The order under review was not so extended, and terminated on the issuance of a further order by the Commission dated August 25, 1933, which is reproduced as **Appendix "A"** to this brief, and again referred to later.

In its **third report,** (191 I.C.C. 361), the Commission points out that:

> "Economic conditions have grown progressively worse since the surcharge plan was authorized. The price level of practically all commodities has continued to fall. The abnormal relation of freight rates, as a whole, to the general level of commodity prices is, therefore, now much more pronounced. The carriers in many instances have found it impossible, due to the above-described conditions and the resulting increased competition with other agencies of transportation, to maintain the rates and surcharges as originally established. In some cases the surcharges were removed, and in others, although the surcharges as such were retained, the basic rates were reduced sufficiently so that when

the surcharges were added to them the total was equal to or less than the former basic rates. **In both cases the surcharges have, therefore, as a practical matter, disappeared.** The extent to which such reductions have occurred can not be accurately determined upon this record but it appears to have been considerable.

"The anticipation, when the surcharges were orignally authorized, that the number of railroads which would fail to earn their fixed charges would be greatly exceeded by those which did was not realized. Instead, 128 Class I carriers operating approximately 83 per cent of the total mileage did not earn fixed charges in 1932, without the surcharges. This condition resulted from the unprecedented decline in railroad freight traffic since 1931. The revenue turned over to the Railroad Credit Corporation fell far short of expectations based upon 1931 traffic, and that institution, although helpful, turned out to be a minor and the Reconstruction Finance Corporation the major prop to railroad finances.

"It is evident that the surcharge plan, as a temporary emergency measure, although productive of some net increase in revenue, falls far short of solving the problem of credit now confronting the railroads generally. **Continuance of the surcharges without limitation or condition would be equivalent to a general increase in freight rates. This clearly is not justified upon the present record.** The problems with which the railroads are confronted today can not be solved by general increases in freight rates. Certainly any substantial increase would result in permanent injury to the railroads. Their low earnings are not the result of low rates. The present relation between commodity prices and freight rates was discussed upon the record to some extent, but that general question will be presented in another proceeding at an early date and can not be determined here. In our original report

herein, under the heading of 'The Railroad Future,' we discussed certain matters of utmost importance to the future of the railroads. We wish to again emphasize the recommendations which we there made." (191 I.C.C. 361.) (Our emphasis.)

The above case, being a sequel to *Fifteen Per Cent Case, 1931,* was submitted to the Commission February 17, 1933, and decided March 7, 1933, on evidence taken prior thereto. Consequently any prediction by the carriers of loss of intrastate revenues based on 1931 movement of traffic had become "an iridescent dream" before the original surcharge period had expired.

In each of the reports of the Commission in *Fifteen Per Cent Case, 1931, supra,* there were strong dissenting opinions. In the original case, 178 I.C.C. 539, 586, Commissioner Tate concurred "in those portions of the report and order which dismiss the petition of the carriers for a fifteen percent increase in freight rates and which discuss the desirability of attention on the part of the carriers to economies and to competition with other means of transportation and the probable desirability for seeking some character of legislative relief; and further in the portions discussing a plan to be worked out so that application of any increase be so applied that interest on bonds of all railroads, weak or strong, be paid, at least *pro tanto;*" but he dissents **"from those portions increasing any rates in any respect or in any amount in this proceeding."** An appropriate order was entered denying the application. (R. 106.)

In the second report, 179 I.C.C. 215, Commissioner Lee, concurring specially says:

"It is evident, however, that there is such opposition to our plan that the carriers will not be

able to put it into effect. In this situation some of my brethren adhere to our original report. There is much in reason to support their position. On the other hand, the majority allows the increased rates to be established without the imposition of any condition. After we found that no increase had been justified and permitted the establishment of slight increases only on the express condition that the earnings produced thereby would be used, to the extent necessary, to meet interest requirements and protect railroad credit, the majority now allows the increases without any condition or restrictive requirement whatever. As between these extremes, it is my position that, in view of the conditions in which the railroads find themselves, we should grant their application to the extent of permitting them to make the increases specified on condition that they loan to the needy carriers such portion of the fund resulting therefrom as may be necessary to meet interest charges. It seems to me, however, that such loans should be made at a nominal rate of interest and without security." (R. 115.)

Commissioner Eastman, dissenting, points out that the Commission "made no finding that the rates resulting from the increases proposed would be just and necessary. No such finding was necessary." (179 I.C.C. 223, R. 117.) He discusses at length the organization of the Railroad Credit Corporation, the evils experienced in the past arising out of pooling arrangements, and the legal obstructions in the way of the proposed loaning plans. Commissioner Eastman's dissent was joined in by Commissioners McManamy, Porter, and MaHaffie. (179 I.C.C. 236, R. 130.)

The dissents of four commissioners to the report and order in No. 25,135, Increases in Intrastate Rates and Charges, supra, are again referred to later.

PROCEEDINGS BEFORE THE LOUISIANA PUBLIC SERVICE COMMISSION FOLLOWING THE FIFTEEN PER CENT CASE, 1931.

After the Commission had issued its original and first supplemental reports in the *Fifteen Per Cent Case, 1931, supra,* various carriers operating in the State of Louisiana and in western territory applied to the Louisiana Public Service Commission for authority to apply on Louisiana intrastate traffic surcharges similar to those allowed by the Interstate Commerce Commission on interstate traffic, excepting the carload commodities on which the Interstate Commerce Commission allowed no increase. (R. 208-214.)

The Louisiana commission conducted an exhaustive hearing, and thereafter, on February 8, 1932, entered its order No. 897, and on March 3, 1932, its amendatory order No. 901, allowing the same surcharges to be applied on intrastate freight rates for similar traffic, except that, for reasons stated, it exempted from the surcharges a list of commodities consisting principally of the products of agriculture and roadbuilding material. It was provided in the order of the Louisiana Commission "that the emergency rate increases herein authorized, shall expire March 1, 1933, (later corrected to March 31, 1933), unless by subsequent order of this Commission the said expiration date is changed or modified."* (R. 135-143.)

The following parallel columns show the commodities excepted by the Interstate Commerce Commission from the interstate surcharges, and the additional commodities excepted by the Louisiana Commission from the intrastate surcharges:

---

* The Louisiana Commission extended its Order No. 897 until September 30, 1933.

COMMODITIES EXCEPTED FROM INTERSTATE SURCHARGES BY INTERSTATE COMMERCE COMMISSION (R. 130).

Wheat
Corn
Oats
Barley and rye
Rice
Grain, n.o.s.
Flour, wheat
Meal, corn
Flour and meal, edible, n.o.s., except cassava flour, sago flour, and tapioca flour
Mill products, n.o.s., except alfalfa meal
Hay and alfalfa
Straw
Cotton in bales, any quantity
Cotton linters, noils, and regins
Cottonseed
Apples, fresh
Berries, fresh
Grapes, fresh
Peaches, fresh
Fruits, fresh, domestic, n.o.s.
Potatoes, other than sweet
Beans and peas, dried
Flaxseed
Sugar beets
Products of agriculture, n.

ADDITIONAL COMMODITIES EXCEPTED FROM INTRASTATE SURCHARGES BY LOUISIANA COMMISSION (R. 141).

Sand, gravel, shells, crushed stone and similar road-building material
Salt cake
Fertilizer and fertilizer material
Cottonseed cake, meal, brand, hulls and meats
Bagasse**
Pulpwood
Stave bolts
Sugar-cane**
Sugar, raw*
Sugar, refined
Sweet potatoes
Fresh vegetables
Pulverized limestone
Waste wood
Second hand sugar bags
Waste paper
Soya beans, velvet beans, Austrian winter peas, and cow peas
Rosin sizing
Potash nitrate
Sirup and molasses
Blackstrap molasses
Crude fire clay
Clay, n.o.i.b.n.
Charcoal
Stave bolts

o.s., as follows: corn cobs, corn cob meal; corn husks or shucks; corn stalks; flaxseed hulls	Less than carload rates.
Horses, mules, ponies and asses	
Cattle and calves, single deck	
Sheep and goats, double deck	
Calves, double deck	
Sheep and goats, single deck	
Hogs, single deck	
Hogs, double deck	
Logs	
Wood	
Ties, railroad	
Excelsior (wood), wood shavings, n.o.i.b.n., and sawdust	
Cotton waste, other than manufactured packing or wiping waste	
Sugar-cane*	

The report and order of the Louisiana commission deals specifically with each commodity excepted from the surcharges (R. 137-141), and in general states:

> "Some of the most important agricultural commodities produced in Louisiana are not in the exempt list as to interstate traffic. Because we were

* Not exempted in original recommendations but by subsequent report carriers were authorized to exclude sugar-cane from interstate surcharges because sugar beets had been excluded.

** On petition of New Orleans Joint Traffic Bureau, the case was reopened as to raw sugar and bagasse, but not disposed of pending the injunction issued in this case.

and are without the necessary funds, the Louisiana Public Service Commission was not represented at the hearings before the Interstate Commerce Commission held in Washington and elsewhere and the Louisiana agricultural interests therefore did not receive the same favorable consideration extended to the major farm products of the other states represented at these I. C. C. hearings.

"The order of the Interstate Commerce Commission did not set forth in any detail any reasons found in the testimony by which the exclusion of certain commodities and the inclusion of other commodities in the rate increases could be justified, practically the only evidence before that Commission being statements as to the financial condition of the rail carriers of the country, showing a general, and in some instances startling, decline in revenues.

"The application of the Louisiana carriers was heard at New Orleans on January 26th, 1932. It was admitted by all persons present at the hearing that the rail lines were in need of emergency rate increase relief, and we are of the opinion that it will be beneficial to the public generally for some measure of relief to be granted the rail lines as to their Louisiana rates.

"Practically every state in the United States has granted or will grant such emergency revenue assistance to the railroads. Among the anticipated favorable results of such revenue increase will be not only a stopping of the further discharge of railroad employees in Louisiana and throughout the United States, but according to the uncontroverted statements made by the carrier representatives, the increase in revenues expected as a result of these proceedings will permit the railroads to re-employ many of their former employees whose services the carriers have been compelled to dispense with because of the financial difficulties faced by them during this period of unprecedented depression.

"This Commission does not feel however, that the principal industries of this state should be expected to contribute increased freight rates to the financially crippled carriers on every commodity they use and produce. We believe that the burden of cooperating towards the financial rehabilitation of the railroads should be as evenly distributed as possible and that the share which the Louisiana industries should be called upon to bear should be equal and uniform among those able to help.

"A study of the rail movement in Louisiana products in interstate commerce was made by this Commission and it was ascertained that most of the commodities produced in Louisiana in great volume were already contributing towards the relief of the railroads by paying the interstate increased emergency rates allowed by the Interstate Commerce Commission in Ex Parte 103 on January 4th, 1932.

"So, in determining whether or not this Commission should grant increases applied for on Louisiana state traffic consideration was given by this Commission to such interstate traffic contributions already being made on such commodities which move so much more extensively in interstate than in intrastate commerce." (R. 135, 136.)

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION IN No. 25135, INCREASES IN INTRASTATE FREIGHT RATES, PART 5, LOUISIANA.

The carriers operating in Louisiana published the surcharges on Louisiana intrastate freight rates as allowed by the Louisiana commission, and as to the excepted commodities, filed with the Interstate Commerce Commission, in connection with the carriers operating in the western States, a general petition asking the Commission to insti-

tute an investigation under Section 13 (3) and (4) of the Interstate Commerce Act, (*U. S. Code, title* 49 *Sec.* 13, 41 *Stat. at L.* 484), with respect to alleged unjust prejudice and advantage over intrastate shippers and localities, and unjust and unreasonable prejudice and disadvantage against interstate shippers and localities and undue burden on interstate commerce, by reason of the refusal of the Louisiana commission, the rate-regulating body of the State of Louisiana, to permit increases allowed by the Interstate Commerce Commission in *Fifteen Per Cent Case, 1931, supra,* to apply on the additional commodities exempted from the surcharges by the Louisiana commission.

This proceeding became *"No. 25,135, Increases in Intrastate Freight Rates and Charges, Part 5—Louisiana,"* on the docket of the Commission. After notice to the proper authorities of the State of Louisiana, the proceeding was set for hearing at New Orleans, Louisiana, on May 6 and 7, 1932, and for further hearing at Washington, D. C., on May 24, 1932. The case was argued before the entire Commission on May 29 and 30, 1932, and submitted.

On September 29, 1932, the Commission rendered its decision in the above case, which included similar controversies in Arkansas, Idaho, Kentucky, Montana, Nebraska, Oklahoma, Texas, Utah and Arizona. (186 I.C.C. 615, R. 11-62.)

The portion of the report dealing with Louisiana intrastate rates will be found on pages 35-38 of the record. (186 I.C.C. 640, 643.) The report of the Commission was not accompanied by an order fixing intrastate rates within the State of Louisiana, but contained the following admonition:

> "An order will be entered discontinuing Part 1 —Arizona. Orders will also be entered in accordance with the foregoing findings, except where

> State commissions directly involved notify us on or before November 1, 1932, that they will promptly permit the increases herein required. If an order is necessary in any part, it will be issued on or immediately after the above date and require the establishment of the increased rates on short notice." (Tr. 57, 186 I.C.C. 664.)

The Louisiana Public Service Commission failed to accept the suggestion of the Commission, and so notified the Commission. Accordingly, on the 7th day of November, 1932, an order was entered by the Commission prescribing intrastate rates within the State of Louisiana on the commodities which were excepted by the Louisiana Commission on the basis of **"rates which shall not be lower than the rates now in force and applicable to the intrastate transportation of said traffic within the State of Louisiana, plus the surcharges authorized by the findings in *Fifteen Per Cent Case, 1931, supra,* 178 I.C.C. 539, and 179 I.C.C. 215, on corresponding interstate traffic, so long as such surcharges are maintained on such traffic in accordance with such findings."*** (R. 2, 3.) (Ante, pp. 2, 3.)

The said order was to have become effective on December 16, 1932, and was "to remain in force until further order of the Commission." (R. 2, 3.) Prior to the effective date of the order, the suit of the State of Louisiana and others against the United States (2 F. Sup. 545) was filed.

The report and supplemental report in *Fifteen Per Cent Case, 1931,* the record before the Commission in *Docket No. 25,135, Increases in Intrastate Freight Rates and Charges, Part 5, Louisiana,* and the report and orders of the Louisiana commission were filed in evidence in the District Court, the testimony has been reduced to narra-

* The rates prescribed on intrastate traffic bore no relation to interstate rates.

tive form, and, together with the exhibits filed in connection therewith, are included in the record. (R. 158, 272.)

SUMMARY OF ARGUMENT.

1. The proceedings before the Interstate Commerce Commission in *Fifteen Per Cent Case, 1931,* were general in form, taking on the nature of a preliminary administrative inquiry as to whether certain proposed schedules if filed under section 6 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, should be suspended. In a proceeding of such a character, the reasonableness of interstate rates involved could not be determined. The Commission in said case made it clear that it was not determining the question of reasonableness under section 1 of the Act, and no finding that the rates resulting from the addition of the approved surcharges were just and reasonable was made.

2. No finding is made in the report of the Interstate Commerce Commission of September 29th, 1932, in its *Docket No. 25,135, Increases in Intrastate Freight Rates,* that the interstate rates as increased by the surcharges on the articles on which the Louisiana Commission refused to allow similar surcharges to be applied on intrastate rates within the State of Louisiana, are just and reasonable, and without such finding the Commission has not laid the necessary predicate for an interference with intrastate freight rates and charges not shown to be unjust or unreasonable.

3. The Interstate Commerce Commission did not allow a general increase in all interstate rates, but selected a list of commodities which it exempted from the interstate surcharges, and allowed the advances to go into effect on other commodities, including those exempted by the Lou-

isiana commission from intrastate surcharges (except sugar-cane which it exempts), without a finding that the particular rates so increased were just and reasonable, which finding is essential before the Commission can disturb intrastate rate in order to remove an alleged undue preference of intrastate shippers or localities and an undue prejudice to interstate commerce.

4. The determination of the reasonableness of the interstate rates on the articles exempted by the Louisiana commission is a prerequisite to a finding of prejudice arising out of the relationship of interstate and intrastate rates, as they exist under the order of the Louisiana commission, and as such a finding is missing in the Commission's reports in the cases under review, jurisdiction is lacking in the Commission to strike down the law of the State of Louisiana.

5. The permission granted by the Commission in its reports and decisions in the *Fifteen Per Cent Case, 1931, supra,* to increase interstate rates by the amount of the surcharges therein specified, including the rates on the articles exempted by the Louisiana commission, expired by limitation on March 31st, 1933, but were extended by subsequent authority granted in 191 I.C.C. 361 to expire September 30, 1933, while the Commission did not so extend its order in *No. 25,135, Part 5, Louisiana Intrastate Surcharges.* No findings could therefore be made by the Commission as to the revenue outcome of the failure to apply intrastate surcharges after March 31, 1933.

6. The mere approval of advances in interstate rates on certain commodities by the addition of a surcharge is not the fixing of just and reasonable interstate rates either in themselves or with respect to other rates, and affords no basis upon which the Interstate Commerce Commission

can exercise its authority under section 13 (4) of the act, to regulate intrastate rates under any circumstances.

7. The Commission in disposing of the *Fifteen Per Cent Case, 1931, supra,* did not apply any general rule as to the application of the surcharges to all freight rates and charges, but, on the contrary, it selected certain commodities on which it allowed the interstate surcharges to be applied without suspension, and as to these allowed varying amounts to be added, while as to others it allowed no surcharges, thus taking off of the carriers the burden of justifying the increase in rates, which is the general rule of the Commission.

8. The action of the Louisiana commission in exempting from the intrastate surcharges the commodities under consideration is in harmony with the action of the Interstate Commerce Commission in canvassing the traffic and determining after consideration of a comprehensive record, what articles moving in intrastate traffic could bear temporary increases in freight rates, and as to what articles so moving, an increase in intrastate freight rates would divert traffic away from the railroads to other modes of transportation and thus cause the revenue of the rail carriers to diminish, or require prompt departure from the rates so increased in order to hold the traffic to the rails or regain that which was lost. Thus the Louisiana commission, in the rendition of its order which the Interstate Commerce Commission now seeks to set aside, exercised a discretion with which the Interstate Commerce Commission cannot lawfully interfere.

9. The Interstate Commerce Commission failed to issue an order in the *Fifteen Per Cent Case, 1931, supra,* prescribing reasonable surcharges or fixing and prescribing reasonable maximum interstate rates; but merely ap-

proved certain surcharges to be added to the applicable interstate rates on some commodities and refused to allow surcharges to be added to other interstate rates, leaving it optional with the railroads to comply or not comply with the authority granted by the Commission to apply the approved surcharges on interstate traffic. There is, therefore, a lack of definite findings and specific requirements by order of the Commission which are essential to action by the Commission in disturbing intrastate freight rates.

10. There is no finding by the Commission in either the *Fifteen Per Cent Case, 1931, supra,* or in *Docket No. 25,135, Increases in Intrastate Freight Rates and Charges, supra,* that any of the rates on any of the commodities to which the Commission now seeks to apply surcharges on Louisiana intrastate traffic, are maximum reasonable rates. (186 I.C.C. 619.)

11. There is no finding by the Commission as to the revenue which the railroads operating in the State of Louisiana will receive from the application of the proposed surcharges on Louisiana intrastate traffic during the remainder of the period in which the surcharges on interstate traffic will be applied, which expires March 31st, 1933, and no evidence upon which such a finding could be made.

12. There is no finding or reference to evidence concerning less-than-carload traffic within the State of Louisiana, or whether the failure of the Louisiana commission to allow the interstate surcharges to be added to the intrastate rates applying on such traffic causes or will cause any undue preference of intrastate shippers and localities, or undue prejudice to interstate shippers or localities, or unjust discrimination against interstate commerce. (R. 7, 8, 9.)

ARGUMENT.

(1)

The Interstate Commerce Commission is without power to prescribe intrastate rates within the State of Louisiana where no finding is made that interstate rates to whose level the intrastate rates are raised, are just and reasonable.

The power and authority of the Interstate Commerce Commission to directly prescribe intrastate rates in order to remove undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, was first invested in the Commission by amendments which were made to the Interstate Commerce Act by the Transportation Act, 1920. (*U. S. Code, title* 49, *section* 13, 41 *Stat. at L.* 484.)

The power of the Commission with respect to intrastate rates, is set forth in Section 13 (4) of the Act, as follows:

> **"Whenever in any such investigation the Commission, after full hearing, finds that** any such **rate, fare, charge, classification,** regulation, or **practice causes any undue or unreasonable** advantage, **preference, or prejudice as between persons or localities in intrastate commerce** on the one **hand and interstate or foreign commerce** on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, **it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum,** thereafter to be charged, and the

classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Primarily, the power of the Interstate Commerce Commission is confined to the making of just, reasonable and non-discriminatory interstate rates. In this field the jurisdiction of the Interstate Commerce Commission is exclusive. Its power to fix and regulate State rates, however, is not a direct or primary power, but it is only incidental to its power to fix just and reasonable interstate rates. The procedure to be followed by the Commission in fixing just and reasonable interstate rates, is set out in Section 15 (1) of the Interstate Commerce Act, as amended by the Transportation Act, 1920. (*U. S. Code, title* 49, *sec.* 15 (3).) This section of the Act requires:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or

will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15a, which was added to *Interstate Commerce Act by Transportation Act, 1920*, did not efface the requirements of Section 13 (4) or Section 15 (1), both of which sections were amended by *Transportation Act, 1920*, but with due regard for their requirements, provides that:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reason-

able expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *provided*, that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The similarity of the requirements of Section 15 (1) and those of Section 13 (4) indicate the intent of Congress to delegate to the Commission the power to remove discrimination against interstate shippers, localities or commerce growing out of interstate rates or charges, or growing out of intrastate rates or charges by following a specified procedure. In Section 15 (1), the Commission is authorized and empowered, and in Section 13 (4) is required, to prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged or observed.

In every case where the Federal commission undertakes to exercise control over intrastate rates, the first jurisdictional questions which arise are, (1), whether its interference is based upon a substantial compliance with the Act, and, (2), whether its action in changing State rates is supported by findings sufficient to warrant it in exercising its jurisdiction over State rates.

The Supreme Court has zealously guarded the dual functions of the State and Federal governments, and has repeatedly declared that before the Federal commission can invade the State domain it must comply in every re-

spect with the provisions of the Act giving it power to interfere with intrastate rates.

In *Florida v. United States*, 282 U. S. 194, 75 L. Ed. 291, the Supreme Court says:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 62 L. Ed. 425, P.U.R. 1918C, 279, 38 S. Ct. 170, *supra*. The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Arkansas R. Commission v. Chicago, R. I. & P. R. Co.*, 274 U. S. 597, 71 L. Ed. 1224, 47 S. Ct. 724, *supra*."

The statement from the *Florida Log* case, *supra*, that **"the justification of the exercise of the Federal power must clearly appear,"** was in response to a serious argument that it was the duty of the Court to determine *de novo* and wholly independent of any determination by the Interstate Commerce Commission, the jurisdictional facts which would bring into existence Federal power over intrastate rates. In the *Florida Log* case, however, it was not necessary for the court to determine this question because there it held that the Federal commission had not made the necessary findings to support its order; and that in the absence of such findings the court would set aside the order without examining the evidence to determine the existence of the facts. The same situation exists in the present case, that is to say, the Commission did not make

the essential findings and therefore it is not necessary for the court to examine the evidence or pursue the question as to the character of determination which the courts must make as to the existence of jurisdictional facts justifying the invasion of State power.

It is pertinent to suggest, however, that in the recent case of *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, the Supreme Court for the first time announced the rule as to the character of review which the courts must give as to the findings of **jurisdictional facts** made by administrative tribunals where such findings involve constitutional rights, and held that the court must make an independent determination of such facts in a trial *de novo*.

(2)

Section 15a Confers no Power on the Commission to Deal With Intrastate Rates. What Is Done Under That Section Must be Done in the Exercise of Its Powers to Prescribe Just and Reasonable Rates Under Those Sections of the Act Authorizing It to Prescribe Such Rates.

The Interstate Commerce Commission is authorized to prescribe intrastate rates in only two classes of cases, namely:

(1) Where it becomes necessary to change intrastate rates to remove preferences and discriminations against persons and localities in interstate commerce. This power was first recognized as existing under Section 3 of the Act to regulate commerce, prior to its amendment by the Transportation Act, 1920, in the *Shreveport* case, 234 U. S. 342, 58 L. Ed. 41, and has been exercised by the Commission many times since that epoch-making case was de-

cided. This power was not exercised in the present case. (R. 627.)

(2) Where it becomes necessary to remove an undue burden on interstate commerce due to the intrastate, as compared with the interstate rates. The present case is confined to the matter of unjust discrimination against interstate commerce, without a finding in regard to the revenue outcome of the increases in intrastate rates due to the surcharge, (R. 627) and without evidence on which such finding could be made.

However, before the Commission has attempted to change intrastate rates in order to remove discrimination against interstate commerce growing out of the relationship of intrastate and interstate rates, it has first established just and reasonable interstate rates, and thereafter related the intrastate rates to the interstate rates thus prescribed. Thus, in *Houston, East and West Texas R. R. Co. v. United States,* (*Shreveport* case, *supra*), the Commission, by specific order required the defendant carriers to put in force and maintain for a period of two years class rates found by the Commission to be reasonable, and further required the carriers to cease and desist from exacting higher rates for the transportation of any article from Shreveport, Louisiana, to Dallas, Texas, and points on its lines intermediate thereto, than were contemporaneously exacted for the transportation of such articles from Dallas, Texas, towards Shreveport, La., for an equal distance. The Court says:

> "It is also clear that, in removing unjust discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fare to the carrier and to the public. Otherwise, it could pre-

> event the injury to interstate commerce only by the sacrifice of its judgment as to the interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms which it establishes."

In this first case dealing with the power of the Interstate Commerce Commission to remove discrimination against persons, places, commodities, or particular descriptions of traffic produced by the relation of intrastate to interstate rates, the court recognized the necessity for the Commission to prescribe just and reasonable interstate rates, and to require the intrastate rates to be fixed at the same level.

In *Illinois C. R. Co. v. Public Utilities Com.*, 245 U. S. 493, 62 L. Ed. 425, the Supreme Court holds that Congress has power to prevent the common instrumentalities of both interstate and intrastate commerce from being used in their intrastate operations in such manner as affecting injuriously traffic which is interstate. The order of the Commission, however, was set aside for its uncertainty. In discussing the manner in which the Interstate Commerce Commission should proceed in removing unjust discrimination arising out of a disparity in intrastate and interstate rates, the court, referring to *The Shreveport* case, *supra*, says that it was there held that:

> "In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but **may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination;** for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one in-

volves control of the other, it is Congress, and not the State, that is entitled to prescribe the dominant rule.' (Our emphasis.)

In *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, 357 U. S. 563, 66 L. Ed. 371, the first case which was decided after Section 13 was amended by the Transportation Act, 1920, so as to give the Commission direct jurisdiction over intrastate rates in cases where such rates, upon investigation, were found to create unjust discrimination against interstate or foreign commerce, the court reviewed the report and order of the Interstate Commerce Commission in *Wisconsin Passenger Fares*, 59 I.C.C. 391.

The court refused to uphold the report of the Commission on the ground that it showed discrimination against persons and localities at all interior points, but upheld the order on the ground that the Interstate Commerce Commission was authorized to remove unjust discrimination against interstate commerce caused by a disparity in intrastate and interstate rates. Speaking of the powers of the Commission under Section 13 (3) and (4), and Section 15a, the Court says:

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. **The new measure imposed an affirma-**

tive duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.

"* * * **Section 15a confers no power on the commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its powers to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates.** When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

In *State of New York, etc., v. United States, et al.*, 257 U. S. 571, 66 L. Ed. 385, the Supreme Court followed the decision in *The Wisconsin* case, *supra*, pointing out that the refusal of the Public Service Commission of the State of New York, to increase the passenger fares to the level of the passenger fares as prescribed by the Interstate Commerce Commission in *Ex Parte* 74, *Increased Rates*, 1930 (58 I.C.C. 220).

Both the Wisconsin case and the New York case were passenger fare cases and were decided upon the theory

that the entire interstate fabric of passenger fares could be defeated by breaking up interstate journeys into intrastate journeys. In both of these cases, the Commission made findings as to both the interstate and intrastate revenues of the carriers and fixed just and reasonable interstate rates to which level they required the intrastate rates to be increased. The period during which the orders fixing the increased interstate fares was to run was unlimited, and it was easy to forecast the result of the failure of the carriers to apply the same fares as were found to be reasonable for interstate journeys.

In the case at bar, however, there is no evidence showing the revenue from the interstate traffic in any of the commodities excepted by the Louisiana commission, and the commission did not prescribe just and reasonable interstate rates to whose level the intrastate rates involved were required to be increased. In fact, the Commission had left the carriers free to apply or not to apply the interstate surcharges, and to reduce or increase the interstate rates. When it dealt with the Louisiana intrastate rates, however, it prescribed intrastate "rates which shall not be lower than the rates now in force and applicable to the intrastate transportation of said traffic within the State of Louisiana, plus the surcharges ,authorized by the findings in *Fifteen Per Cent Case, 1931*, 178 I.C.C. 539, and 179 I.C.C. 215, on intrastate traffic so long as such surcharges are maintained on such traffic in accordance with said findings." Thus we have a case where the Commission, failing to fix interstate rates, fixes intrastate rates, and requires a level of intrastate rates to be maintained which have no relation to interstate rates.

The peculiar situation which resulted from this unwarranted action of the Commission was that while the

interstate rates plus the surcharges, were subject to constant fluctuation, the intrastate rates within the State of Louisiana were "frozen," and taken out of the power of regulation by the Louisiana Public Service Commission. There was no interstate level of rates to which the intrastate rates could be raised; there was no previous finding by the Commission that the interstate rates on the commodities excepted by the Louisiana commission, as increased by the surcharges, were just and reasonable; there was no finding by the Commission that the specific rates on any of the said commodities which would result from the application of the interstate surcharges to the interstate rates were just and reasonable. The flexibility of the authority of the Interstate Commerce Commission in *Fifteen Per Cent Case, 1931*, as to interstate rates, and the inflexibility of its order in *No. 25,135, Increases in Intrastate Freight Rates and Charges, Part 5, Louisiana*, left a chaotic uncertain condition as to the interstate freight rates and revenues, which could not be reduced, by a comparison of 1931 revenues to a definite, or even reasonably, accurate result for the 3½ months in which the Louisiana surcharge order remained in effect.

These facts are quite different from those present in the *Wisconsin* case and the *New York* case, *supra*, upon which the United States and the Commission place so much emphasis, for in both of those cases, which dealt only with passenger fares, the Commission's order fixed the interstate fares at 3.6 cents per mile and afterwards required the intrastate fares in those States to be increased to 3.6 cents per mile. As no comparisons are made in the present case of interstate and intrastate rates on the commodities excepted by the Louisiana commission from the surcharges, it is plain that the jurisdictional facts present in the *Wisconsin* and *New York* cases were not developed in

the present case, and therefore these cases, which have not been followed by the Commission in the present case, do not support the order in controversy.

(3)

THE COMMISSION IS A STATUTORY BODY EXISTING ONLY BY THE WILL OF CONGRESS AND EXERCISING ONLY SUCH POWERS AS HAVE BEEN EXPRESSLY DELEGATED TO IT. IT CANNOT GO BEYOND THESE POWERS AND IS HELD TO A STRICT COMPLIANCE WITH THE STATUTE IN MATTERS OF JURISDICTION AND PROCEDURE.

As the Interstate Commerce Commission is a creature of Congress, having specially delegated powers, it can exercise no other powers and must exercise the powers which have been delegated in the manner prescribed.

In the case of *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 387, 76 L. Ed. 348, 354, the Court says:

> "But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the boundaries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. **This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character, that it may act only within the scope of the delegation; that its authority is to fix a maximum or minimum reasonable rate; for it is precluded by the statute from**

> **fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity."** (Our emphasis.)

The procedure which the Commission must follow in exercising the powers delegated to it by Section 13 (3), (4), is set out specifically. We can find no better definition of this procedure than has been given by the courts.

In *Georgia Public Service Commission v. United States, et al.*, 39 Fed. (2d) 167, 169, 170, and 42 Fed. (2d) 467, (affirmed by the Supreme Court, 283 U. S. 767, 75 L. Ed. 1397), the District Court, through Judge Sibley, in refusing an interlocutory injunction, discusses the Commission's powers under Section 13 (3) and (4), to remove discrimination against interstate commerce by prescribing State rates, and says:

> "The delegation to the Interstate Commerce Commission of **power to prescribe an intrastate rate is found in section 13,** subsection 4, of the amended Commerce Act [49 USCA section 13 (4)]. The power reaches to the general revision of generally discriminatory state scales, *Wisconsin R. R. Commission v. C. B. & Q. R. R.*, 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086, and to dealing with particular rates, commodities and practices, *Florida v. United States* (D. C.) 30 F. (2nd) 116. But in every exercise of this interference with state functions the procedure required by subsection 4 must be followed. The first named requisite of the hearing required is that there be a 'full hearing.' If discrimination in state rates be found substantial enough to require removal, the question must then always arise whether the state rate or the interstate rate is unreasonable and should be altered. A previous establishment of the interstate rate as reasonable will not settle the question, because the rep-

resentatives of the state are entitled to a full hearing on this question of relative reasonableness."

* * * * * * * * * *

"The second question depends upon the language of the order. Section 13 (4) provides that the Interstate Commerce Commission, on finding discrimination by state rates, 'shall prescribe the rate, fare ,or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged.' The language is mandatory. One of four things must be done: First, make a fixed rate; second, make a maximum; third, make a minimum; fourth, fix both a maximum and a minimum. The order of Dec. 9, 1929, undertakes the last." [39 F. (2nd) 169.]

The *Georgia* case was reviewed and affirmed by the Supreme Court, (*Georgia Public Service Commission v. United States, et al.*, 283 U. S. 767, 75 L. Ed. 1397), and, in delivering the opinion, Mr. Justice Brandeis says:

"Appellants contend that the order of the Interstate Commerce Commission is void, because it was entered without the full hearing prescribed by Section 13 (4). The argument is this. Paragraph 4 prescribes that 'whenever * * * the Commission, after full hearing, finds' a state rate to be unlawful because it causes undue prejudice or unjust discrimination, 'it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum or minimum, thereafter to be charged.' Act of February 28, 1920, chap. 91, Section 416, 41 Stat. at L. 456, 484 U.S.C. title 49, Section 13, amending Act of February 4, 1887, chap. 104, Section 13, 24 Stat. at L. 379, 383. The claim is that there was no 'full hearing' before entry of the challenged order, because the Commission limited the supplemental hearing to the question of prejudice and discrimination, and refused to consider anew the question of the reasonableness of the interstate scales. It is

> **true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level.** *Virginia Corp. Commission v. Aberdeen & R. R. Co.*, 136 Inters. Com. Rep. 173, 180."

The Government and the Commission in their brief contend that the *Georgia* case was not a "general revenue" case, and cites the Commission's report in which it is argued that "the *Georgia* case did not emanate from a general-revenue case and dealt chiefly with 'undue prejudice and discrimination to interstate shippers and localities,' as is made clear by the comments on page 773 of the Court's opinion." The Court, however, made no distiction between the undue prejudice that results to interstate shippers or discrimination against interstate commerce, but clearly indicated that it is the duty of the Commission in either case to "determine whether the existing interstate rates are reasonable," before the intrastate rates alleged to cause the discrimination can be disturbed by the Commission.

In *Brimstone R. & Canal Co. v. United States*, 276 U. S. 104, 72 L. Ed. 487, the Supreme Court set aside an order of the Interstate Commerce Commission fixing divisions for the Brimstone on the grounds that:

> "The record discloses that before making the challenged order, the Commission failed to consider the items definitely specified by Section 15 (6). And it must be annulled."

The Commission has not followed the procedure as

set out in Section 13 (3) and (4), in the present case, and its order fixing intrastate rates is therefore invalid.

The exigencies of the acute railroad situation which existed in 1931, did not justify the Commission in setting aside State sovereignty, which in the present case is shown to have exerted its independent power wisely and with due regard for the welfare of both carriers and shippers by excepting from the State surcharge a list of commodities including only those whose producers were in such dire financial distress that they could not bear additional burdens of expense without complete collapse. Their plight was even worse than that of the railroads.

In the case of *Atchison, Topeka & Santa Fe Railway Company v. United States, Interstate Commerce Commission, et al.*, 284 U. S. 247, 248, 76 L. Ed. 273, the Supreme Court holds:

> "We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under paragraphs 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co. v. United States*, 281 U. S. 658, 669, 74 L. Ed. 1098, 1105, 50 S. Ct. 444. The legal standards governing

> the action of the Commission in determining the reasonableness of rates are unaltered * * *."

In these recent cases, as in many others, the Court has held the Commission to a strict conformity with the requirements of the law in the performance of its duties.

(4)

THE ORDER IS INVALID BECAUSE IT IS NOT SUPPORTED BY THE ESSENTIAL FINDINGS REQUIRED TO SUPPORT AN ORDER INTERFERING WITH INTRASTATE RATES.

We have pointed out that the Commission made no finding as to the reasonableness of the interstate rates, or of the intrastate rates. It made no finding that Louisiana State traffic was not contributing its fair proportionate share to the transportation burden. It made no finding as to the revenue which could reasonably be expected from the Louisiana rates as increased by the surcharges, or that the intrastate rates as altered would during the period from December 16, 1932, to March 31, 1933, inclusive, produce or were likely to produce additional income necessary to prevent an undue burden upon the carriers' interstate revenues. On the contrary, the Commission in its report quotes from the *Florida Log Case, supra*, as follows:

> "The commission made no findings as to the revenue which had been derived by the carriers from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the interstate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service,"

and declines to follow this admonition of the Supreme Court in *Florida v. United States, supra,* and explicitly says:

> "A finding as to the future revenue effect of increased rates is not, strictly speaking, a finding of fact but a prediction. The evidence may be such that a prediction may be made with reasonable assurance of accuracy, and in such instances it sufficiently approximates a fact so that a finding is justified. In other instances the result may be wholly problematical, and no definite finding can be justified. We have never felt that we ought to forbid a proposed increase in rates on the sole ground that we are unable to find that it will accomplish its purpose, where the outcome is plainly a mere matter of judgment. The decision of such questions of judgment is a responsibility of management, and we are not the managers of the railroads.
>
> "In *Ex Parte* No. 103, voluminous evidence in regard to the probable revenue result of the proposed 15 per cent increase in rates was presented by shippers and little or none by the railroads. In view of competitive conditions, the trend of commodity prices, and other factors, we were convinced that such an increase would in the end hurt rather than help the earnings of the carriers, and hence disapproved it. We were not persuaded that the much smaller surcharges, which we finally approved, would have a similar result. **The evidence did not justify a definite finding on this point, and we left the application of these surcharges to the judgment of the managements.** If the results were unfavorable, the managements were also left free to eliminate the surcharges or reduce the rates still further. A similar policy should, we believe, be followed in this proceeding." 186 I. C. C. 626 (R. 22.)
>
> * * * * * * * * * * *
>
> "Where we make such a finding (of unjust discrimination) and require an increase in the in-

> **trastate rates, it is to be understood that we conclude that no positive finding in regard to the revenue outcome of the increase can be justified."** 186 I. C. C. 627. (Our emphasis.) (R. 23.)

Since the Commission was unable to make a finding in regard to the revenue outcome of the increase in the intrastate rates by the addition of the surcharges, the order must be condemned under the rule laid down in *Florida v. United States, supra.*

(5)

THE DISSENTING OPINIONS OF FOUR COMMISSIONERS IN THE LIGHT OF SUBSEQUENT EVENTS SHOW THAT THERE WAS NO SUBSTANTIAL DISCRIMINATION AGAINST INTERSTATE COMMERCE TO BE REMOVED.

The Commission was far from unanimous in its report. Commissioner Lewis concurred as to those States where all increases had been denied, but as to the excepted commodities in the other States, such as Louisiana, he dissented except insofar as the record disclosed actual discrimination against persons and localities, holding that the action of the majority is "an undue and unwarranted invasion of state jurisdiction." (In *Part 5—Louisiana* there is no finding of discrimination against persons and/or localities.)

He further says:

> "The record conveys to my mind the strong impression that in a number of instances State commissions exercised a careful judgment, on the records before them, not unlike that which we exercised

in considering probable diversion of traffic, substitutions, and the inability of certain industries and commodities to stand increases, or increases beyond a certain amount. The Supreme Court said in the *Wisconsin Case* that the power to exercise unified control of intrastate and interstate commerce provided by the act of 1920 was only 'to the extent of maintaining efficient regulation of interstate commerce'; that the 'Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.' Evidently 'the level' is not in all instances to be attained by identical increases."

* * * * * * * * * *

"I believe that there are additional instances in which we should not have attempted to set aside exceptions as to particular traffic made by State authorities." 186 I. C. C. 665, (R. 57, 59).

Commissioner Aitchison dissented on the grounds that (1) appropriate findings to establish federal jurisdiction had not been made; (2) that it did not satisfactorily appear that the increases if made would give added revenues, and (3) that the State commissions had simply exercised their discretion as to matters within their jurisdiction.

Commissioner Aitchison's sound reasoning is a formidable arraignment of the errors of the majority. In part, he says:

"The reasonableness of the interstate rates involved could not be determined in such a character of proceeding; the commission went to some pains

to make clear that it in nowise was determining the question of reasonablness under section 1 of the act. No such finding is now made in this proceeding; in the light of the theory of the carriers (who are virtually if not in form, complainants against the States) as voiced upon argument no such finding can here be made within the scope of the issue presented. **But a determination of the reasonableness of the interstate rates is a necessary prerequisite to the finding of prejudice in respect of State rates against interstate rates, and lacking such a finding in this or any prior proceeding, jurisdiction is lacking to make a finding striking down the law of the State.**" (R. 59.)

"(2) Beyond this jurisdictional obstacle, the record is not persuasive that the increases in the State rates now required will result in any added revenues. The report discloses the highly speculative character of the testimony adduced by the carriers. Mathematical calculations as to what revenues would be if the traffic of recent years continued to move in past volume have little if any probative force, in the light of the conditions of the day. *Calif. Growers' & Shippers' Protective League v. S. P. Co.*, 185 I.C.C. 299. Particularly is this true when the interstate rates before us are by their terms limited to March 31, 1933, and have but a few months to run.

"(3) By and large, the action of the State commissions in exempting the traffic under consideration from the application of the surcharges appears to be in harmony with our own action in surveying the field to determine what interstate traffic would be able to bear temporary increases, and our refusal to permit general increases in respect of innumerable commodities as to which it appeared that increases would diminish revenue by diverting traffic or blocking its movement by rail. **Similar latitude in discretion should be accorded to the authorities of the States. With the**

exercise of their discretion we may not interfere, unless the case of unlawful transgression of the interstate field is clear. The action of the State commissions here vacated is at least as likely to conserve the revenues of the rail carriers as that prescribed by the majority, and in such circumstances, the presumption of validity of the State action with which we start can not be said to be overcome." (186 I. C. C. 666, R. 59, 60.) (Our emphasis.)

Commissioner Brainard also dissenting, says:

> "I am of the opinion that the record is insufficient to justify the conclusions of the majority, to warrant the exercise of the power asserted, or to sustain the proposed orders prescribing the level of intrastate rates." (186 I. C. C. 667, R. 60.)

Commissioner Tate in a most vigorous dissent, says:

> "I dissent from every portion of the report which seeks to compel the addition of such surcharges." (Intrastate.)
>
> * * * * * * * * * *
>
> "I do not believe this commission has ever had a record upon which the rates resulting from the addition of surcharges could be held to be reasonable rates. In so far as the case may be said to be a revenue case, I do not believe the carriers have made a record which carries the burden of showing that the revenues would really be increased by the addition of these surcharges. For me, it is not sufficient merely to show that, if the same amount of traffic was carried by rail carriers with the surcharge added as was carried without the surcharge, greater revenue would result. This, of course, would be obvious, if that were all. The record is at least in equipoise as to whether there have been and would be, for the future, greater revenues resulting from

the additional surcharges than would result if the surcharges were not imposed. The report of the majority cites various general-revenue cases where there have been general advances or reductions. I do not regard them as in point here. The commission unanimously denied the 15 per cent increase which was sought. Had the commission added one-half of 1 per cent, or 1 per cent, or 1.5 per cent, or any other conceivable general percentage, then I think those cases would have been in point, in that the various States were permitted to assume the burden of showing where any particular form of traffic or commodities should not be made subject to the general advance. But this the commission did not do in this case. It undertook, upon what I have considered an insufficient record, to pick out in advance certain commodities upon which alone it would allow rates to go in without suspension; and even as to those so picked out it did not allow a uniform surcharge but allowed some three or four different amounts of surcharge.

"I do not believe, in a case of this kind, that the burden can be said to be shifted to the States to take an article out of the rule, when the commission itself has seen fit not to apply a general rule, but to choose, itself, certain articles as to which a surcharge is to apply, and then to fix a different surcharge for different articles in the chosen list. I see nothing to take, in this kind of a proceeding, the burden off the carriers to justify the increase in rates, which is the general rule." (186 I. C. C. 668-669, R. 60, 61.)

Where four of the commissioners so clearly and sharply disagree with the majority, and state the law as it has been interpreted by the commission and by the courts, in numerous cases cited in this brief, their dissents are entitled to more than the weight given to the dissent which

gives no basic reasons and uses no argument founded on precedent to support the opinion.

(6)

THERE WAS NO EVIDENCE BEFORE THE COMMISSION DEALING WITH THE PERIOD COVERED BY INTRASTATE SURCHARGES, AND NO FINDINGS WERE MADE AS TO THE RESULT OF THE APPLICATION OF THE SURCHARGES DURING THAT PERIOD.

The period during which the intrastate surcharges prescribed by the Interstate Commerce Commission would have applied had they become effective was from December 16, 1932, to March 31, 1933, inclusive; or 3½ months.

There was no evidence before the Commission dealing with this period, and no finding is made by the Commission as to the result on the revenues of the carriers had the surcharges been applied on intrastate traffic on the exempted commodities during that period.

No forecast is made by the Commission as to the increases in revenues had these surcharges been applied in this 3½ months, and no evidence was before the Commission from which an estimate of the revenues of the carriers from the surcharges could be made.

In that part of its report dealing with Louisiana intrastate rates, the Commission says:

> "It is estimated that, **based on the traffic of 1931,** the application of the surcharges on the excepted commodities would produce additional annual revenue of $26,420 to the Gulf Coast Lines, $53,470 to the Missouri Pacific Railroad Company, $1,848 to the New Orleans & Lower Coast Railroad

> Company, $108,442 to the Texas & New Orleans Railroad Company, $92,198 to the Texas & Pacific Railway Company, $12,493 to the Kansas City Southern Railway Company, and $101,798 to the Illinois Central. The Louisiana & Arkansas Railway Company would receive $37,911 additional revenue on sand, gravel, and crushed stone. Railroad traffic men expressed the opinion that, notwithstanding possible diversions of traffic to other transportation agencies, the addition of the surcharge to the intrastate rates would produce an increase in revenue." (R. 35, 36.)

These figures were obtained by multiplying the intrastate tonnage of the several commodities which moved over the Louisiana railroads by the amount of the surcharge.

The report in *No. 25,135, Part 5, Louisiana*, was issued September 29, 1932 (R. 11), and was based upon evidence taken many months before (May 6-7, 1932, R. 159), while the order covered a very limited period long subsequent to the Commission's reports in *Fifteen Per Cent Case, 1931*, which were issued October 16, 1931 (R. 62), and December 15, 1931, respectively.

That the Commission itself did not take the evidence as to the estimated additional revenues that would have accrued to the Louisiana carriers from the application of the surcharges on intrastate traffic for the year 1931 as a basis for results from the application of such surcharges during the 3½ months period remaining after the order in controversy was issued, is clearly shown by the following language used by the Commission in its report:

> "* * * While the evidence before us would in many instances justify findings of undue or unreasonable advantage, preference, or prejudice as

between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, this evidence is more or less fragmentary, and **we shall therefore confine our findings to the matter of unjust discrimination against interstate commerce. Where we make such a finding and require an increase in the intrastate rates, it is to be understood that we concluded that no positive finding in regard to the revenue outcome of the increase can be justified.** Every finding of unjust discrimination will be accompanied by a saving clause, such as was approved by the Supreme Court in the *Wisconsin* case, and we shall require the surcharges to be applied on the intrastate traffic only so long as they are contemporaneously maintained on corresponding interstate traffic." (Our emphasis.) (R. 23.)

It is apparent that the Commission, having in mind its permissive authority to the carriers to apply interstate surcharges, fully realized that it would be futile to anticipate the result of applying surcharges to the intrastate freight "rates now in force and applicable to the intrastate transportation of said traffic within the State of Louisiana," and was unwilling to find from the facts of record what the outcome of the application of the surcharges on intrastate traffic would be. Certainly if a finding as to the revenue outcome could have been justified it was the duty of the commission to make such a finding.

The caution exercised by the Commission in failing to make a **"positive finding in regard to the revenue outcome of the increase,"** was equivalent to a finding that no substantial discrimination against interstate commerce had been shown as a result of the Louisiana commission's action in excepting a small list of commodities which were in no position to bear the increase, from the surcharges.

The Commission did not make the essential findings necessary to support its order because the evidence before it afforded no basis for such findings.

The precaution was well-founded, for the **third supplemental report of the Commission on further hearing, in** *Fifteen Per Cent Case 1931, supra,* based on an investigation made by the Commission in the midst of the period in which the Louisiana intrastate surcharges would have been applicable, says:

> "* * * The carriers in many instances have found it impossible, due to the above-described conditions and the resulting increased competition with other agencies of transportation, to maintain the rates and surcharges as originally established. In some cases the surcharges were removed, and in others, although the surcharges as such were retained, the basic rates were reduced sufficiently so that when the surcharges were added to them the total was equal to or less than the former basic rates. In both cases the surcharges have, therefore, as a practical matter, disappeared. The extent to which such reductions have occurred can not be accurately determined upon this record but it appears to have been considerable." 191 I.C.C. 369.

Thus, the whole spirit and letter of the law as it affects the regulation of intrastate rates by the Commission has been violated by the order of December 16, 1932, and the divesting of the State regulatory commission of all authority over State rates is directly in conflict with the Supreme Court's interpretation of the act as set out in the *Wisconsin* case, *supra.* The Court there says:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce

> under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and **must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."**

The Commission's order in the present case is not only not "directed to substantial disparity which operates as a real discrimination against, or obstruction to, interstate commerce," but it fails to "leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves," which the Supreme Court in the *Wisconsin* case says it must do.

We have seen that the Commission's decision is in direct conflict with the decision of the Supreme Court in the *Florida Log Case, supra,* because of its failure to make the basic findings which are necessary where State rates are involved. The Commission's report and order under review is also arbitrary because it has attempted to require the carriers in the State of Louisiana to increase their intrastate rates (none of which were shown to be on a lower basis than interstate rates), while not making similar requirements as to the intrastate rates of other States.

From the Commission's report it appears that many of the surcharges have not been made effective in other States, and that no order as to such States has been made. The Commission enumerates the States of Alabama, Florida, Mississippi, North Carolina, Tennessee, Virginia and Ohio, but it is shown by the record that in practically no

States of the Union have all of the increases allowed by the Interstate Commerce Commission, been made on intrastate traffic. It also appears that in many instances the carriers have not applied the increases, as later pointed out by the Commission in its third report in *Fifteen Per Cent Case, 1931.* 191 I.C.C. 361.

In Arizona no increases were permitted on any important State traffic and yet, because the Arizona carriers "are apparently willing to accept the State commission's viewpoint," the hearing as to Arizona rates was cancelled, and the proceeding with reference thereto was discontinued." No order has been made increasing the intrastate rates of Iowa, Nevada and Washington. Proceedings in these cases having been vacated, set aside and discontinued on the 25th day of July, 1933 (see Appendix "A"). The arbitrary action of the Commission was violative of all principles of right and justice of the Interstate Commerce Act, and of the Constitution of the United States.

(7)

THE COMMISSION HAS MANY TIMES HELD THAT IT HAS NO POWER TO DISTURB INTRASTATE RATES UNTIL IT HAS DETERMINED THE REASONABLENESS OF THE INTERSTATE RATES.

In re Slatting Cars for Watermelons, 78 I.C.C. 732, the Commission holds that before the Commission can condemn an intrastate regulation as resulting in unjust discrimination against interstate commerce, the propriety of the charge on interstate traffic must be established.

In re Ohio State Rates on Sand, Gravel, Stone and Paving Blocks, 85 I.C.C. 66, the Commission holds that it is necessary to inquire as to what is the general level of rates

on commodities under consideration which the Commission has found to be fair to interstate commerce in territory involved, and whether there is substantial disparity between this level and that of the intrastate rates before it can disturb intrastate rates.

In *Hunter Bros. Mercantile Co. v. American Ry. Exp. Co.*, 107 I.C.C. 313, the Commission holds that before an intrastate rate, required by State authority, can be changed by the Commission, it must affect interstate commerce injuriously to a material extent.

In *Atlas Portland Cement Company v. Chicago, B. & Q. R. Co.*, 81 I.C.C. 1, the Commission holds that the reasonableness of the interstate rates must necessarily be determined although not alleged in the complaint, before a determination can be made of the issue of undue preference and prejudice.

The Commission has, in *Virginia Corp. Com. v. Aberdeen and R. R. Co.*, 136 I.C.C. 173, recognized the correctness of our contention. In that case it says:

> "We pass to the point which the interveners make with respect to the reasonableness of the rates in issue. Where the issue is under section 3 and only interstate rates are involved, we can make an order requiring the removal of undue prejudice without regard to the level of the rates. If in complying with such an order the carriers transgress section 1, the rates so filed can be suspended and dealt with accordingly. Where the issue is between intrastate and interstate rates, however, and undue preference of intrastate shippers or commerce and undue prejudice to interstate shippers or commerce are shown, it is necessary in the first instance to determine whether or not the offense is caused by the intrastate or the interstate rates. Plainly we can not require intrastate rates

> to be raised above a maximum reasonable level in order to cure a disparity with interstate rates, and where the intrastate rates have been fixed, as they have been here, by the order of a State commission, they can not be increased by the carriers without an order from us. This situation is recognized in paragraph (4) of section 13, which provides that where we find that any rate made or imposed by authority of any State causes any undue prejudice to persons or localities engaged in interstate commerce or any unjust discrimination against such commerce, we shall prescribe the rate 'or the maximum or minimum, or maximum and minimum, thereafter to be charged,' for the purpose of removing such prejudice or discrimination. Obviously such an order can not be made without consideration of the reasonableness of the rates in issue."

In *Rates on Sulphuric Acid from Natrona*, 148 I.C.C. 408, the Commission held that when it acts affirmatively under section 13, it fixes what are and will be reasonable interstate rates, and then finds on a showing of similarity in transportation conditions and competition between shippers in interstate and intrastate commerce, and considerations of carrier revenue, that the lower state rates create undue prejudice to shippers in interstate commerce, and directs the removal of such undue prejudice and preference and unjust discrimination **by the establishment of the rates found to be reasonable for interstate transportation.**

The long continued and uniform practice of the Interstate Commerce Commission in interpreting the procedure to be followed where rates made or imposed by State authorities cause any undue prejudice to persons or localities engaged in interstate commerce, or any unjust discrimination against interstate commerce, is entitled to great weight. *Louisville & Nashville Railroad Co. v. United States*, 282 U. S. 740, 75 L. Ed. 672.

The present case is the second departure by the Commission since Section 13 was amended by Transportation Act, 1920, from its otherwise unbroken practice of establishing a state-wide level of just and reasonable interstate rates and then requiring the intrastate rates to be raised to that level in order to sustain an order fixing state-wide intrastate rates. The other case was the *Florida Log Case, supra,* which was set aside by the Supreme Court.

(8)

MERE GENERAL PERMISSION OF THE COMMISSION TO ALL CARRIERS TO APPLY CERTAIN SPECIFIED SURCHARGES ON SOME TRAFFIC AND DENYING THEM THE AUTHORITY TO APPLY SURCHARGES ON OTHER COMMODITIES, IS NOT THE PRESCRIBING OF JUST AND REASONABLE RATES IN THE MANNER REQUIRED BY SECTIONS 1 AND 13 (4), IN REMOVING DISCRIMINATION AGAINST INTERSTATE COMMERCE CAUSED BY A DISPARITY IN INTRASTATE AND INTERSTATE RATES.

The Commission relies upon section 15a, added to the *Interstate Commerce Act* by the *Transportation Act, 1920,* (41 Stat. L. 488, *U. S. Code,* title 49, sec. 15a), to justify its action in directly prescribing intrastate rates without first determining the reasonableness of the interstate rates and entirely disregards the provisions of sections 1, 13 (4), 15 (7) and 15a. Section 15a has carefully preserved the rate-making powers under the other sections of the act. It contains definite requirements in that respect. Paragraph (2) of section 15a is as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that

carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; **Provided,** That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

In the case of *Eagle Cotton Oil Co. v. Southern Ry. Co. et al.*, 51 F. (2d) 443, the Court says:

"(2). The Commission's order in the *Fifteen Per Cent. Case, supra,* effective July 1, 1917, authorized a general increase of 10 cents per ton throughout the country, but did not purport to grant permission to advance any particular rate. The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to rates on coal; besides it was not the equivalent of an order of the Commission, and the Commission by section 10 of the Federal Control Act (40 Stat. 456) was given the power to suspend or set it aside. But with the aid of the Director General's order the rate did not exceed $1.80 per ton, which was less than the rates approved by the Commission upon the basis of which it awarded reparation to appellant. The carriers rely on *Ex parte* 74, *supra,* which authorized an increase of 25 per cent. in the general level of all rates, but without approval of any particular rate, as their authority for increasing the rate on coal shipped from the Alabama mines to Meridian to $2.25 per ton; and then claim that the rate became $2.03 per ton in 1922 as a result of

the Commission's decision in *Reduced Rates, 1922, supra.* The most that can reasonably be contended for in support of the proposition adopted by the trial court that the $2.03 rate was Commission-made is that it resulted from adding to and building up the rate of $1.20 that was authorized by the Commission. **Aside from the fact that the Commission's order entered in 1915, establishing the $1.20 rate had expired by limitation long prior to the decisions in *Ex parte 74* and in *Reduced Rates 1922*, the law, as we understand it, is that orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as giving approval of or prescribing particular rates."** * * * (Our emphasis.)

In *Atchison, T. & S. F. Ry. Co. v. Arizona Grocery Co.*, 49 F. (2d) 563, (affirmed in *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 248 U. S. 369, 76 L. Ed. 348) the Court says:

"It was thus evidently contemplated by Congress that the Commission would not fix a particular rate to the exact cents to be collected by the carrier, but should in every case fix a rate which is the maximum rate which the carrier can charge. This was the legislative method pointed out by Congress to the Commission for fixing by it of freight rates. It is true that the language of the subsequent amendment now in force and hereinabove quoted, taken alone and without considering the cardinal purpose of the act, might lead to the conclusion that the Commission might either fix a just and reasonable rate or a maximum rate, **but in view of the history of the legislation and its cardinal purpose it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate.** In this connection it should be observed that in the numerous decisions by the courts considering the question of freight rates before the enactment of

> section 15 in its present form (Act Feb. 28, 1920, 41 Stat. 484, [49 USCA par. 15]), **the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable. No other thought has apparently entered the mind of the judges who are so frequently called upon to pass upon the power of the Commission under the Hepburn Act and the amendments thereto.** *Chicago, R. I. & P. Ry. Co. v. U. S.* (D. C., 1925) 6 F. (2d) 888; *Houston Cotton Exch. v. A. & A. R. R. Corp.* (1924) 87 I.C.C. 392; *Id.*, 93 I.C.C. 268; *Chicago, R. I. & P. Ry. Co. v. U. S.* (1927) 274 U. S. 29, 47 S. Ct. 486, 71 L. Ed. 911; *Montrose Oil Ref. Co. v. St. L. S. F. Ry.* (D. C., 1927) 25 F. (2d) 750; *Id.* (1923) 78 I.C.C. 572; *Id.* (1924) 95 I.C.C. 96; *Mellon v. World Pub. Co.* (C.C.A. 1927) 20 F. (2d) 613; *World Pub. Co. v. Director General* (1919) 53 I.C.C. 491." (Our emphasis.)

In affirming the case of *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 76 L. Ed. 348, 248 U. S. 369, the Supreme Court says:

> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement has the force of a statute. This Court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between au-

thority delegated by state legislation and that conferred by Congressional action.

"But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the boundaries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character, that it may act only within the scope of the delegation; that **its authority is to fix a maximum or minimum reasonable rate; for it is precluded by the statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity.**" (Our emphasis.)

The above cases clearly define the rate-making powers of the Commission. It must follow the procedure set out in the act. When fixing just and reasonable rates (and it can fix no rates except those that are just and reasonable), it acts as a legislative body, and its acts are subject to the same tests as all other legislation. The mere granting of an option to add a surcharge to an interstate rate, without any evidence as to the resulting rate, is not a fixing of rates in the manner prescribed by law.

In no case decided in Federal or State courts of highest resort, have we found the power of a rate regulatory commission upheld where the plain mandate of the law has been disregarded, as has been done in this case as a matter of expediency.

(9)

THE ARBITRARY NATURE OF THE COMMISSION'S ORDER.

The Commission not only declined to make the findings which the Supreme Court in the *Florida Log Case, supra,* has stated are necessary to support an order prescribing intrastate rates as a means of removing unjust discrimination against interstate commerce, but the order itself is of the most arbitrary character. We have pointed out that by its terms the order prescribing Louisiana intrastate rates "freezes" these rates and deprives the Louisiana Public Service Commission of its authority to change them so long as the order remains in force. As to interstate traffic the Commission had exercised its discretion in excepting from the surcharges a list of selected commodities, for the reason that such commodities could not bear an increase. There is no finding in any of the reports of the Commission cited in this brief as to whether the surcharges allowed were added to existing rates or reduced rates, and no reference is made to evidence as to what rates the surcharges would be superimposed.

In its first report in *Fifteen Per Cent Case,* 1931, *supra,* "The carriers offered no evidence with respect to the rates on any particular commodity or kind of traffic other than general assertions in testimony by three presidents, one from each territory, that on much traffic the increased rates would produce revenue substantially in proportion to the percentage sought, they offered no evidence as to the effect which the increase would have on the movement of all or any traffic. They presented no witness familiar with traffic conditions, and resisted the

attempts of shippers to call their traffic officers to the stand." (R. 79.)

The only method provided in the act for allowing rates proposed by the carriers to become effective on their own initiative, when they are protested, is found in Section 15 (7). When tariffs are filed under this section proposing increased rates, the carrier must assume the burden of proof that such rates are just and reasonable. The act provides:

> "At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare or charge sought to be increased after the passage of this act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." (*Interstate Commerce Act, sec.* 15(7), *last pp., U.S.C., title* 49, *sec.* 15.)

The carriers refused to assume this burden, and closed the record in the *Fifteen Per Cent Case, 1931*, with "no evidence with respect to the rates on any particular commodity or kind of traffic."

The Commission, closing its eyes to these defects in the record, granted authority to apply the surcharges. The reports in *Fifteen Per Cent Case, 1931*, devoid of the essential findings necessary to support an order increasing interstate rates, left the Commission in the position where it had to act in disregard of the law, and this it did. Its action was arbitrary in the extreme.

(10)

Subsequent Reports of the Commission In Fifteen Per Cent Case, 1931, Show That the Expected Revenues From the Surcharges Did Not Materialize, and That There Was No Foundation for a Prediction as to Increased Revenues as a Result of the Intrastate Surcharges, Which Finding It Had Refused to Make.

As an aftermath of the failure of the surcharges to accomplish their purpose, we find in the last report in *Fifteen Per Cent Case*, 1931, *supra*, the dissenting opinions of Commissioner Eastman (now Federal Coordinator of Railroads), concurred in by Commissioner McManamy, and those of Commissioner Porter and Commissioner Tate.

We excerpt from these dissenting opinions the following, Commissioners Eastman and McManamy dissenting:

> "Since this extraordinary remedy was prescribed for the special purpose which then appeared to be paramount, conditions have changed in at least three important respects:
>
> "1. The demand for railroad freight service has further decreased, to such an extent that it has been found impossible to protect fixed charges through the operation of the surcharge plan. It was necessary to create the Reconstruction Finance Corporation for the further protection of this situation, and now it seems probable that a number of railroads will have to be reorganized. For the future, therefore, the carriers wish to abandon the pooling feature of the surcharge plan which was originally the vital part of it, and to treat the surcharges as ordinary rate increases.
>
> "2. Economic conditions, although they were bad enough in 1931, have continued to grow worse, and the level of commodity prices has in general continued to fall. The statement which we made

in 1931, therefore, that the "relation of the general level of freight rates to the general level of commodity prices is a factor which can not be disregarded, particularly in a time of general prostration," has even more force now than then.

"3. In an indeterminate, but certainly a very large, number of instances the railroads found it impossible to maintain the rates as increased by the surcharges. Instead of eliminating the surcharges in such instances, however, they very generally retained it and reduced the basic rate. In most, if not all, of these instances the total charge is now less than it was before we added the surcharge. Actually, therefore, the surcharge has been *eliminated, although it still exists in form.*"

* * * * * * *

"The surcharge plan was in the nature of a special tax assessed upon industry for what was believed to be the general good, and which we made it possible to assess through the exercise of our discretion in permitting tariffs to go into effect without suspension. Such exercise of discretion was, I believe, justified as a matter of Statesmanship under the extraordinary conditions then existing. The special purpose of the plan, however, has failed and that purpose is to be altogether abandoned. Moreover, conditions have so changed as to make such a special tax much less justifiable.

"The railroads of the country are in desperate financial straits, but they are in such a condition because the other industries and the people of the country generally are in similar or worse straits. When we adopted the surcharge plan we eliminated most farm products from its application, because of the prostration of agriculture and the very low level to which the prices on such products had fallen. There was no other reason for the elimination. Under the circumstances we concluded that an increase would result in unjust and unreasonable rates, and in a burden which could not "reason-

ably be borne under present conditions.' The instant record shows that this conclusion is now equally applicable to the coal industry, the lumber industry, the citrus fruit industry, and many others.

"In the profound economic disturbance which now exists, the railroads have been and are, so far as their rates are concerned, a sheltered industry. I have figures before me which show that in 1931 the average ton-mile revenue was 45.7 per cent higher than in 1913. If adjustments are made for the great increase in average length of haul since 1913 and for the change in proportions of major traffic groups, the level in 1931 may have been as much as 68 per cent higher than in 1913. The figures are not available for 1932, but such reductions in rates as were made in that year were in whole or in part offset by the surcharge increases. Contrast this with the well-known facts as to what has happened in the case of commodity prices generally, with the exception of steel rails, where the price, most unfortunately for the railroads and for the country, has been maintained near the pinnacle by the stubborn will of producers without insight or vision." (191 I.C.C. 372, 373, 374).

Commissioner Porter, dissenting, in part says:

"The policy of the majority in continuing these surcharges with the thought that it will help the carriers is an iridescent dream. Why we should temporize with these surcharges, as is done here by the majority, is beyond my comprehension. They were authorized only as a temporary measure of relief. They have failed utterly in their purpose. Their continuance is a positive injury to the carriers and shippers alike. Why should we prolong the uncertainty as to their permanance caused by the chaotic and discriminatory situation caused by their existence?

* * * * * * * * * * *

"The policy pursued here of authorizing these

increased rates of the carriers is contrary to that being engaged in at present by every other industry. If there be a single other industry that is raising its prices at this time, it has entirely escaped my attention. We all know they are doing just the opposite. A walk down Main Street of any community and a glance in any store window, or a look at the advertisements of any paper, demonstrates the efforts of business generally to attract sales by the lowering of prices. Why should railroads with nothing to sell but transportation be the only industry immune from such a policy, especially when, as never before, they are haunted by four competitors who are all rapidly gaining in the race? Thanks to the wisdom of the executives in charge of many railroads, as I shall hereinafter show, they are pursuing no such policy of raising rates—only this commission is doing that.

* * * * * * * * * *

"Not only have the carriers been unable to maintain their level of rates of a year ago, plus the surcharge, but the situation of intrastate rates is far from a happy one. Several of the States have refused point blank to put in any of these extra rates for intrastate application within their States, and are fighting their going in, in the courts. A large number of States have exempted a portion of their traffic from their burden, particularly in instances where it was a commodity of great concern to the State and moving in large volume in the particular State. There are very few States where they have been allowed to be applied on all traffic intrastate. While this is the hodge podge situation at the present, we have every reason to believe that it will become very much worse, for the reason that not a single State commission has advised us that they favor the continuance of these surcharges, but, on the contrary, almost all of them are actively opposed to it. It is extremely doubtful if a half

dozen of the States will authorize the carriers to put them in again intrastate after March 31, 1933." 191 I.C.C. 375, 376, 377.

Commissioner Tate, dissenting, in part says:

"I did not believe the additions, by whatever name they might be called, ought to have been granted when they were first granted, and I cast the one dissenting vote, though contenting myself with merely recording my dissent in the report, without a separate expression. I believe I was right then, and that, in view of the economic condition of the various industries the products of which are made to bear the surcharge, I am on still firmer ground in not agreeing to a continuation of these surcharges. The commission had in many cases, and has since in many other cases, said what would be reasonable maximum rates. If these findings were correct, then the addition of any amount, by whatever name called, would make unreasonable rates. I think it is almost axiomatic or, at least, that it must logically follow, that if the commission was in error in putting in the surcharges, the mere fact that they had been in could not constitute a legal ground for continuing the surcharges and thus prolonging and projecting the error, even though, confessedly, at least some inconvenience might arise to the carriers in readjusting their basic rates by reason of the denial of these surcharges. Paragraph (7) of section 15 of the interstate commerce act provides that 'At any hearing involving * * * a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, was just and reasonable shall be upon the carrier, * * *.' I have never believed that there was such a record upon which the increases were allowed as could be said to be such a record as would meet the requirement that the carriers shall assume and carry said burden. On the contrary, I am of the opinion that the record

> demonstrates by the preponderance of testimony that the various industries, the products of which were made subject to the surcharge, were in such condition as that they could not stand the surcharge without grave injury and that a proper consideration of the relationship of the value of the service rendered to the charge made would not permit these additions. I can not see how the use of some magical or cabalistic word, such as 'surcharges,' took these increased rates, which the shippers would have to pay, out of the plain letter of the law. It seems to me that any increase sought ought to be proposed in a tariff filed in the regular way and be subject to the regular machinery of possible suspension and investigation." 191 I.C.C. 380, 381.

These recent expressions from members of the Commission in the retrospect, show how faulty it would have been to make a finding as to the revenue outcome of the surcharges applied to the ever changing rate schedules and the complete collapse of the surcharge plan even before the order in controversy was entered.

CASES RELIED UPON BY THE APPELLANTS.

The United States and the Commission rely upon the cases in which the Commission has removed discrimination against intrastate commerce by prescribing state rates, to support the controverted order.

We have examined these cases and in every case where an order of the Commission fixing State rates has been reviewed and upheld by the courts, there have been findings by the Commission as to the effect of the maintenance of the intrastate rates upon the revenues of the carriers, as well as the prescribing of just and reasonable interstate rates which were used as the standard to which State rates were made to conform.

Thus, in the *Wisconsin Case, supra,* there were find-

ings as to the effect of the maintenance of the intrastate fares upon the carriers' revenues. Similar findings were made in the *New York Case, supra.* In both cases a fare of 3.6 cents per mile was declared reasonable for interstate traffic, and State rates were required to be the same.

In the *Georgia Case, supra,* reasonable maximum rates were first prescribed, and to their level intrastate rates were required to be raised.

In *Alabama v. United States,* 283 U. S. 776, 75 L. Ed. 1406, the Commission first prescribed a general level of intrastate rates on fertilizers and fertilizer material, and made definite findings supported by evidence as to the revenue outcome of the State and interstate rates. The intrastate rates were required to be raised to the previously prescribed reasonable interstate level of rates.

In *Louisiana Public Service Com. v. Texas & New Orleans R. Co., et al.,* 284 U. S. 125, 76 L. Ed. 201, the Commission first established just and reasonable interstate rates, and prescribed the same schedule on intrastate traffic, making adequate findings of the revenue outcome.

In *New England Divisions Case,* 261 U. S. 184, 67 L. Ed. 605, the Commission was not dealing with undue prejudice or unjust discrimination but was engaged in fixing divisions of joint through rates in which neither the public nor the States had any interest. While the same principles apply to the fixing of just and reasonable divisions as apply to the fixing of just and reasonable rates, the removal of unjust discrimination against interstate commerce is governed by rules of procedure which require in the first instance the fixing of just and reasonable rates, on interstate traffic.

In *Dayton-Goose Creek Ry. v. United States,* 263 U. S. 456, 68 L. Ed. 388, the main question before the court was

the constitutionality of the recapture provisions of the Interstate Commerce Act as amended by Transportaion Act, 1920. (Ch. 91, Sec. 422, Sec. 15 (a), 41 Stat. at L. 456, 489-491, Fed. Stat. Supp. Anno. 1920, p. 11).

The Supreme Court held the recapture provisions to be constitutional, but in the decision it does not anywhere declare that the rate-making provisions of the act are changed or abrogated, or that the procedure to be followed under Section 13 (3) (4) in removing unjust discrimination against interstate commerce growing out of relationship of interstate and intrastate rates, is to be disregarded when the Commission has proceeded in the first instance under Section 15 (a) to fix interstate rates that will yield the carriers supposedly increased revenues.

(NOTE. The recapture provisions of the Interstate Commerce Act added by Transportation Act 1920, were repealed by *Emergency Transportation Act*, 1933, title II, sec. 206 (a), approved June 13, 1933.)

CONCLUSION.

We submit that the decree of the lower court enjoining the order of the Commission was correct and should be affirmed, and

Respectfully,

GASTON L. PORTERIE,
Attorney General of the State of Louisiana,

WYLIE M. BARROW,
Special Assistant to the Attorney General of Louisiana.

CERTIFICATE.

I, Wylie M. Barrow, do hereby certify that copies of the within brief have been duly served by mail upon all opposing counsel of record.

Baton Rouge, La., October 2, 1933.

APPENDIX "A"

"ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of July A. D. 1933

No. 25982
SURCHARGES ON INTRASTATE TRAFFIC WITHIN THE STATE OF IOWA

No. 25984
SURCHARGES ON INTRASTATE TRAFFIC WITHIN THE STATE OF NEVADA

No. 25987
SURCHARGES ON INTRASTATE TRAFFIC WITHIN THE STATE OF WASHINGTON

No. 25135
INCREASES IN INTRASTATE FREIGHT RATES AND CHARGES, PART 5—LOUISIANA

No. 25135
INCREASES IN INTRASTATE FREIGHT RATES AND CHARGES, PART 10—TEXAS

No. 25135
INCREASES IN INTRASTATE FREIGHT RATES AND CHARGES, PART 12—UTAH

It appearing, That by orders dated May 18, 1933, in Nos. 25982, 25984, and 25987, the Commis-

sion upon petition of certain common carriers by railroad operating in the States of Iowa, Nevada, and Washington entered upon investigations to determine whether the failure or refusal of the respective State rate-regulating authorities to permit a continuation of the increases on intrastate traffic similar to those permitted by this Commission for interstate traffic, in *Fifteen Per Cent Case, 1931,* 178 I.C.C. 539, 179 I.C.C. 215, and 191 I.C.C. 361, causes or will cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and that by orders dated May 18, 1933, the Commission reopened No. 25135, Part 5—Louisiana, Part 10—Texas, and Part 12—Utah, for further hearing upon the question of the lawfulness of the rates resulting from the refusal of the respective State rate-regulating authorities to permit application after March 31, 1933, of the surcharges on intrastate traffic similar to those permitted by this Commission for interstate traffic by supplemental report entered March 7, 1933, in *Ex Parte* 103, *Fifteen Per Cent Case, 1931;* and

Whereas, In proceedings of similar nature we have heretofore rendered decisions applying the law to the facts developed of record and entered orders accordingly, such orders, where affirmative in nature, being effective for a considerable portion of the surcharge period, the time now intervening prior to the expiration of the surcharges involved is too short to make it possible for any orders which the Commission may enter in these proceedings to become effective and rates in compliance therewith published and thereafter maintained for any substantial period of time, probably not for a period sufficient to justify the expense of tariff publication:

It is ordered, That the said orders of May 18, 1933, be, and they are hereby, vacated and set aside and that these proceedings be discontinued.

By the Commission.

GEORGE B. McGINTY,
(SEAL) Secretary."

APPENDIX "B"

STATUTES RELIED ON.

The Interstate Commerce Act.

"*Sec.* 13. (*As amended June* 18, 1910, *and February* 28, 1920. (*U. S. Code, title* 49, *Sec.* 13.)

"(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made on imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to

avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act."

"(4) Whenever in any such investigation the Commission, after a full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

"*Sec.* 15a. (2) *and* (3) (*Added February* 28, 1920.) (*U. S. Code, title* 49, *Sec.* 15a.)

"(2) In the exercise of its powers to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: **Provided,** That

the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable and to prescribe different rates for different sections of the country."

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: **Provided,** That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."